

No. 70337-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES ALAN CHAPPELLE Jr.,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Charles Chappelle's constitutional right to counsel was violated when the trial court had him proceed pro se without an unequivocal waiver of his right to counsel.

2. The trial court erred by denying Mr. Chappelle's motion for a new trial.

3. Appellant assigns error to the trial court Findings of Fact 2, 3, 4, and 5 in support of the Order Denying Defendant's Motion for a New Trial.

4. The State did not provide Mr. Chappelle with meaningful access to the material he needed to represent himself in violation of article I, section 22.

5. Defense counsel's conflict of interest denied Mr. Chappelle his constitutional right to effective assistance of counsel at his motion for a new trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has a constitutional right to counsel and a constitutional right to represent himself, and he must unequivocally waive his right to counsel in order to proceed pro se. U.S. Const. amends. VI, XIV; Const. art. I §22. Mr. Chappelle wanted new



counsel, but the trial court questioned him about self-representation.

Mr. Chappelle told the court he could represent himself with the assistance of an intern or co-counsel, and he requested counsel immediately after the court granted him pro se status. Given the absence of an unequivocal waiver of his right to counsel, must this Court grant Mr. Chappelle a new trial? (Assignments of Error 1-3)

2. When a defendant seeks to represent himself, the court should engage in a colloquy that ensures that the defendant understands, among other things, the nature of the charges and the dangers of self-representation. The trial court did not discuss the elements of the charged offense, possible defenses or what was needed to prove the deadly weapon enhancement. The trial court also did not warn Mr. Chappelle of the dangers of self-representation. Given the absence of a knowing, intelligent, and voluntary waiver of his right to counsel, must this Court grant Mr. Chappelle a new trial?

(Assignments of Error 1-3)

3. When an incarcerated defendant represents himself at trial, article I, section 22 requires that the State provide him with meaningful access to the materials he needs to defend himself. Mr. Chappelle was provided with the police reports, witness statements, exhibits, and

medical reports over the course of the trial, often immediately before witness's testimony. He was unable to contact defense witnesses by telephone; he was not provided with any legal materials, such as the Rules of Evidence; and he was appointed standby counsel to help coordinate his efforts or provide advice. Must Mr. Chappelle's conviction be reversed because he was forced to represent himself at trial without needed materials in violation of article I, section 22?

(Assignment of Error 4)

4. The accused's constitutional right to effective assistance of counsel includes conflict-free counsel. At his motion for a new trial, Mr. Chappelle was represented by an attorney from the same office as his original counsel. In arguing for a new trial, new counsel did not point out her colleague's failure to provide Mr. Chappelle with his file materials when Mr. Chappelle took over his own defense, a violation of RPC 1.16(d). Where the new attorney's relationship with Mr. Chappelle's original counsel constrained her ability to effectively represent Mr. Chappelle, must his case be remanded for a new motion for a new trial with conflict-free counsel?

### C. STATEMENT OF THE CASE

Charles Chappelle took the light rail into Seattle one June evening headed to Belltown night clubs where he could promote his brother's music CD's. 11/19/12 RP 72-73. Mr. Chappelle does not drink, but he socialized and danced at Club Amber. Id. at 74-75. Mr. Chappelle planned to spend the night with his brother, who was at the club and had a car. Id. One of the women Mr. Chappelle danced with was from out of town, and he walked her and her friends to their hotel in the Westlake area. Id. at 75-76.

As Mr. Chappelle returned from Westlake to find his brother at Club Amber, he walked north on Third Avenue and then south on Blanchard. 11/19/12 RP 76-77. At Blanchard, Mr. Chappelle was walking ahead of Amr Elshahawany, who was yelling obscenities, holding his face, and stumbling. Id. at 77-78. As Mr. Chappelle approached a group of people, Mr. Elshahawany pointed at Mr. Chappelle and told his friends to "get" him. 11/15/12 RP 61-62; 11/19/12 RP 66, 78.

Four to five men rushed at Mr. Chappelle and accused him of "fucking with" their friend. 11/14/12 RP 70, 98; 11/15/12 RP 102-03;

11/19/12 RP 78-79. One man punched Mr. Chappelle in the face, and Mr. Chappelle defended himself. 11/14/12 RP 68; 11/19/12 RP 79. When the other men joined the fight, Mr. Chappelle tried to run away, but he fell and was assaulted again. 11/19/12 RP 79-81.

Mr. Chappelle believed he was fighting for his life as up to eight people were attacking him, including Mr. Elshahawany, who was urging the others on. 11/19/12 RP 66, 80-82, 97-98. At one point Mr. Chappelle jumped into a stranger's passing car in an attempt to escape, but someone in the crowd pulled him back out. 11/15/12 RP 106; 11/19/12 RP 66, 83-84. The crowd continued to attack Mr. Chappelle, and he lost his hoodie, wallet, and CD's. 11/15/12 RP 64, 93; 11/19/12 RP 84-85. After about 15 minutes, Mr. Chappelle was able to run away, but the men chased him for a few blocks, yelling that they were going to kill him. 11/14/12 RP 107; 11/15/12 RP 103-04; 11/19/12 RP 67, 85-85, 94-95.

Mr. Chappelle walked towards downtown looking help. 11/19/12 RP 85-86. Police officers stopped Mr. Chappell at Seventh and Pike. 11/15/12 RP 125-26, 144; 11/19/12 RP 85-86. Mr. Chappelle had blood on his hands. 11/15/12 RP 128. His head was

bruised, and he suffered from neck and rib pain and cuts on both hands.

Id. at 89-90, 108-09.

The police arrived at Fourth and Blanchard and found a “fairly chaotic scene” with a number of people running around, a number with blood on them. 11/15/12 RP 41. Mr. Elshahawany bleeding heavily from a deep cut on his face. 11/15/12 RP 41-42. He was taken to Harborview Hospital. 11/14/12 RP 26;

A police officer brought Alaa Al-Jalaihawl and Jasmina Merdanovic, both friends of Mr. Elshahawany, to view Mr. Chappelle at 7<sup>th</sup> and Pike. 11/14/12 RP 99; 11/15/12 RP 128, 145. Neither had seen anyone stab Mr. Elshahawany, but Mr. Al-Jalaihawl had participated in the fight and Ms. Merdanovic had observed it. 11/14/12 RP 97-98, 102; 11/15/12 RP 51, 60-63. Both identified Mr. Chappelle as the man in the altercation. 11/14/12 RP 100; 11/15/12 RP 47. Mr. Elshahawany later picked Mr. Chappelle’s photograph from a photo montage as the person who cut him. 11/14/12 RP 27-29.

The King County Prosecutor’s Office charged Mr. Chappelle with second degree assault under RCW 9A.36.021(1)(a) and (c) and also alleged he was armed with a deadly weapon, citing RCW 9.94A.825 and RCW 9.94A.533(4). CP 60. Prior to trial, Mr.

Chappelle's motion for a substitute counsel was summarily denied by the presiding criminal judge. 10/26/12 RP 4-5.

The case was assigned to the Honorable Michael Hayden on November 8, 2012. 11/8/12 RP 2. On the next day of trial, November 13, Mr. Chappelle again sought to have new counsel appointed. 11/13/12 RP 4, 6-10. The court interpreted Mr. Chappelle's motion as a motion to waive his right to counsel and represent himself. 11/13/12 RP 10-11. After a brief colloquy, Mr. Chappelle's attorney was discharged. CP 346; Id. at 18-19.

The trial proceeded without a break for Mr. Chappelle to obtain his file, the discovery, or any legal materials. At several points during the trial, Mr. Chappelle voiced objections because he did not have witness statements, police reports, or other information he needed and he was unable to reach defense witnesses. 11/13/12 RP 46-51; 11/15/12 RP 5-13, 20, 116-17, 153-54.

At trial, Mr. Elshahawany explained that he and a number of other people were celebrating a friend's birthday and college graduation at a VIP booth at Tia Lou's, a Belltown nightclub. 11/14/12 RP 9-12. Mr. Elshahawany had reserved a nearby hotel room so the party could continue and people would not have to drive home.

11/14/12 RP 10, 13-14, 62. The group stayed at Tia Lou's until it closed and then left together. Id. at 11, 13.

One of the partygoers, Heather Hanson, was parked a few blocks from the nightclub and planned to drive home. 11/14/12 RP 14, 63; 11/15/12 RP 85-86. Ms. Hansen's car would not start, and her friends and passersby gathered and tried to help. 11/14/12 RP 94; 11/15/12 RP 60, 87-89. Mr. Elshahawany went into an alley to urinate and exchanged words with another man in the alley. 11/14/12 RP 16-17, 19, 64, 95. The man, Mr. Chappelle, reached out and touched Mr. Elshahawany, who later realized his face was bleeding. Id. at 17, 20-21.

Mr. Chappelle either before or after Mr. Elshahawany left the alley. 11/14/12 RP 24, 85, 97; 11/15/12 RP 88. Mr. Elshahawany tried unsuccessfully to restrain Mr. Chappelle and pointed at him to his friends. 11/14/12 RP 24; 11/15/12 RP 91. Mr. Elshahawany's friends surrounded the man and fought with him. Id. at 25, 35.

Mr. Elshahawany had a "through and through" laceration on the right side of his face that injured a branch of the facial artery. 11/19/12 RP 10, 14. A surgeon repaired the artery and the wound was treated with stitched on the outside and inside of Mr. Elshahawany's mouth.

Id. at 15-16. A forensic scientist from the Washington State Patrol Crime Laboratory testified that Mr. Elshahawany's DNA was a minor contributor to blood found on Mr. Chappelle's left hand. 11/19/12 RP 43-44, 50-51.

The jury convicted Mr. Chappelle of second degree assault but did not find that he was armed with a deadly weapon. CP 126-27. Prior to sentencing, the court granted Mr. Chappelle's motion for the appointment of counsel. CP 347.

Mr. Chappelle moved for a new trial, arguing that he did not enter a valid waiver of his constitutional right to counsel and that the State did not timely provide him with the material he needed for his defense. CP 128-71. The motion was denied. CP 291-92.

Mr. Chappelle was sentenced to 57 months incarceration followed by 18 months community custody. CP 272-80. He now appeals. CP 281-90.

D. ARGUMENT

1. **Mr. Chappelle did know knowingly, intelligently, and voluntarily waive his constitutional right to counsel.**

Mr. Chappelle did believe his court-appointed attorney was zealously advocating for him, but his oral motion for substitute counsel was denied prior to trial and his written motions to discharge counsel



were never heard. On the second day of trial, Mr. Chappelle asked the trial court to discharge his attorney, but also asked for an intern or co-counsel, and he asked for new counsel shortly after the court discharged his attorney. The trial court determined that Mr. Chappelle had waived his right to counsel and ordered him to proceed pro se. Mr. Chappelle's conviction must be reversed because his equivocal waiver of his constitutional right to counsel was not knowing, intelligent, and voluntary.

a. The accused must knowingly, intelligently, and voluntarily waive his constitutional right to counsel in order to exercise his constitutional right to self-representation. The federal and state constitutions guarantee a criminal defendant the right to counsel.<sup>1</sup> U.S. Const. amends. VI, XIV; Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v Heddrick, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). In addition, “[c]riminal defendants have an explicit right to self-representation

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<sup>1</sup> The Sixth Amendment provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The Fourteenth Amendment states in part, “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

Article I, Section 22 provides in part, “In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . .”

under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution.” State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing Const. art. I, § 22; Faretta, 422 U.S. at 819).

Unlike the right to counsel, the right to self-representation is not absolute. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Given the tension between the two rights, courts are required to indulge in “every reasonable presumption against a defendant’s waiver of his or her right to counsel.” Madsen (quoting In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1990), cert. denied, 531 U.S. 1125 (2001), in turn quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001) (Silva II).

In order to exercise his constitutional right self-representation himself, the accused must knowingly, intelligently, and voluntarily waive his right to counsel. Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). In addition, the defendant’s request to proceed pro se must be both unequivocal and timely. Madsen, 168 Wn.2d at 504; DeWeese, 117 Wn.2d 376-77. Thus, the court should

engage in a colloquy with the defendant to ensure that, at a minimum, he understands the nature of the charge against him, the possible maximum penalty, and the requirement that he comply with technical procedural and evidence rules. Acrey, 103 Wn.2d at 211; Silva II, 108 Wn. App. at 539. The defendant must waive his right to counsel with “eyes open, which includes an awareness of the dangers and disadvantages of the decision.” State v. Hahn, 106 Wn.2d 885, 895, 726 P.2d 25 (1986) (citing Faretta, 422 U.S. at 835).

b. Mr. Chappelle did not knowingly, intelligently, and voluntarily waive his constitutional right to counsel. Prior to trial Mr. Chappelle filed written motions asking the court to dismiss the charges against him and to discharge his counsel. CP 15-33, 32-52, 296-314. On October 26, his motion for a new attorney was summarily denied by the presiding criminal judge. 10/26/12 RP 4-5.

Mr. Chappelle’s case was assigned to Judge Hayden on November 8. The court heard pre-trial motions and motions in limine and discussed jury selection. 11/8/12 RP 4-42. On the next trial day, November 13, Mr. Chappelle wanted to file a written motion asking the court to “take my counsel off the case.” 11/13/12 RP 4, 6-7. Defense counsel Carlos Gonzales asked Mr. Chappelle if he wanted substitute

counsel or wanted to proceed pro se, and Mr. Chappelle answered, “Yes. I make a motion to discharge counsel. This is [an] affidavit of prejudice.” Id. at 5.

Mr. Chappelle explained he wanted both his lawyer and the judge to be removed from his case. 11/13/12 RP 7. Mr. Chappelle related that he had not received “fair representation,” citing counsel’s refusal to pursue requested motions, locate defense witnesses, or investigate Mr. Chappelle’s injuries. Id. at 7-9. Mr. Chappelle added he was undergoing serious health problems that were going untreated while he was incarcerated. Id. at 9.

The court expressed confusion about what motion it was addressing, and asked Mr. Chappelle if he wanted to represent himself. 11/13/12 RP 9-10. Mr. Chappelle responded “No.” Id. at 10.

The Court: You want to be without counsel? You want to represent yourself?

The Defendant: No. I have actually had several lawyers that try to take my case. I try to change counsel, and motion to deny – was denied. All my motion to dismiss was denied. All my motions are never heard . . .

Id. at 10 (emphasis added).

Despite Mr. Chappelle’s expressed frustration with his attorney and his inability to have his motions heard, the trial court did not

address Mr. Chappelle's request for a new attorney. 11/13/12 RP 10-11. Instead, the court interpreted Mr. Chappelle's comments as a "very equivocal" motion to represent himself and began to question Mr. Chappelle about self-representation. Id. at 10-11.

Although Mr. Chappelle said he wanted to represent himself, he also requested the assistance of an "intern." Id. at 11. The court tried to explain that self-representation meant he would not have any help, but Mr. Chappelle then said he wanted "co-counsel," which the judge said was not possible. Id. at 13.

The court then quickly informed Mr. Chappelle of the standard sentence range and maximum term he faced, learned Mr. Chappelle had no legal training and had never represented himself before, and warned Mr. Chappelle that he would have to follow the rules of evidence and criminal procedure. 11/13/12 RP13-15. The court also informed Mr. Chappelle that there would be no recess and it would not rule on his written motions. Id. at 16-18. Finally, the court advised Mr. Chappelle against self-representation in two sentences. Id. at 18. Mr. Chappelle confirmed, "That's my decision," and Mr. Gonzales was discharged. Id. at 19; CP 346.

After a short recess waiting for the prospective jurors, Mr. Chappelle again asked the court for co-counsel and requested new counsel. 11/13/12 RP 23-24.

The Defendant: I would just like to ask at this time of the record, motion filed for me to have co-counsel, and also I would like for my jury instructions, ask for motion to find my jury instructions later, since I don't have them today.

The Court: Let me suggest, sir, if you are pro se that a co-counsel representation does not exist. You either are represented by counsel or you are not. And you have unequivocally told me you wanted to discharge counsel. It was not a good decision. But having co-counsel with yourself is not an arrangement that's recognized under our court system.

The Defendant: Okay. Well, I just like, on the record, that I wanted to file a motion.

The Court: What's that?

The Defendant: Like to put on the record that I would like to file a motion for counsel.

The Court: For counsel?

The Defendant: Uh-huh.

The Court: You have already discharged counsel.

The Defendant: Yeah, I wanted to discharge that counsel for ineffective assistance.

Id. at 23-24 (emphasis added). Instead of addressing the issue, the court told Mr. Chappelle “that was not your motion” and he had to “remain pro se.” Id. at 24.

Jack Murray from the Urban League stepped in to tell the court that Mr. Chappelle’s family understood that Mr. Chappelle did not intend to represent himself but was seeking a new attorney because of difficulties he was having with his lawyer. 11/13/13 RP 24-26. Mr. Chappelle confirmed that Mr. Murray was correct. Id. at 26. The trial court again refused to address a motion for substitute counsel, insisting “there is not a motion.” Id. at 26-27. The court appeared more concerned that Mr. Murray and Mr. Chappelle’s family move so that there was room for the prospective jurors than with the information Mr. Murray was trying to convey. Id. at 25, 27.

Mr. Chappelle had filed a number of motions requesting new counsel. CP 16, 20-22 (filed 10/26/12); CP 37, 45-47 (filed 11/7/12); CP 298, 304, 311-12 (filed 10/19/12). And, on November 13, he filed an affidavit in which he alleged that his attorney refused to call witnesses pre-trial to address his injuries.<sup>2</sup> CP 62. He also filed a

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<sup>2</sup> Counsel did request a continuance because Mr. Chappelle was in extreme pain due to a displaced rib and had a medical appointment. 11/8/12 RP 5-14.

document on November 15 that included his “Motion for Change of Counsel, Art. I § 3.” CP 325.

Over the next two days Mr. Chappelle’s supporters continued to try to get Mr. Gonzales to return to the case, but he told them he needed a court order to do so. 11/14/12 RP 3-4; 11/15/12 RP 155-56.

c. Mr. Chappelle’s waiver was not valid because the trial court ignored his request for substitute counsel. A request to proceed pro se may only be granted if the defendant knowingly and intelligently waives the right to counsel. Faretta, 422 U.S. at 835; DeWeese, 117 Wn.2d at 377. In order to “protect defendant from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations be defendants regarding representation,” the waiver must be unequivocal. DeWeese, 117 Wn.2d at 376. The defendant’s dissatisfaction with his court-appointed attorney “does not in itself constitute an unequivocal request by the defendant for self-representation.” Id. at 377.

In Kienenberger, the defendant’s first court-appointed attorney was replaced due the defendant’s dissatisfaction with that lawyer, and he then filed several “Notices of Misrepresentation” concerning new counsel. United State v. Kienenberger, 13 F.3d 1354, 1356 (9<sup>th</sup> Cir.



1993). When the new attorney moved to withdraw, the court clearly informed the defendant that he had a constitutional right to counsel or to represent himself, but that he had no right to hybrid representation. Id. Although the defendant insisted he wanted to represent himself, he also wanted “advisory” counsel to assist him on procedural issues. Id. The Ninth Circuit concluded the trial court correctly denied the attorney’s motion to withdraw. Id.

While Kienenberger, on numerous occasions, requested that he be “counsel of record,” his request were always accompanied by his insistence that the court appoint “advisory” or “standby” counsel to assist him on procedural matters. Kienenberger never relinquished his right to be represented by counsel at trial. His request to represent himself were not unequivocal.

Id.

Mr. Chappelle approached the court because he wanted a new attorney, but the trial court never addressed that request, resulting in an uninformed waiver of the right to counsel. The November 13 hearing was proceeded by several requests for substitute counsel, which the court apparently had not reviewed. Had the court simply asked Mr. Chappelle why he wanted to represent himself, the court would have understood what Mr. Chappelle was requesting and clarified his options. See State v. Dougherty, 33 Wn. App. 466, 469, 655 P.2d 1187

(1982), rev. denied, 99 Wn.2d 1023 (1983) (defendant must be subjected to a “penetrating and comprehensive examination by the court to determine the subjective reasons behind the refuse to accept counsel.”).

In addition, Mr. Chappelle’s waiver of his right to counsel was accompanied with requests for an intern or co-counsel to assist him, and it was immediately followed by a motion for a new attorney. A similar situation was found to constitute an inadequate waiver of the right to counsel in State v. Brittain, 38 Wn. App. 740, 689 P.2d 1095 (1984). There the defendant wanted to go pro se only if he could not get a new attorney, but the superior court never addressed the request for new counsel. Brittain, 38 Wn. App. at 742-43. Because Brittain’s waiver of counsel was conditioned upon not having substitute counsel appointed and the court never addressed his request for new counsel, the Brittain Court held that the defendant’s waiver was not knowing, intelligent, and voluntary. Id. at 743. Mr. Chappelle similarly did not enter a knowing, intelligent, and voluntary waiver of his constitutional right to counsel.

In denying Mr. Chappelle’s motion for a new trial, the trial court concluded that, while Mr. Chappelle’s request to proceed pro se was

initially equivocal, “the court clarified with the defendant the exact nature of his request, and he subsequently made repeated and unequivocal requests to proceed pro se.” CP 291 (Finding of Fact 2). The court also found that, despite the later requests for counsel, Mr. Chappelle’s initial request for self-representation was “unequivocal” and his waiver of his right to counsel was knowing, intelligent, and voluntary. CP 292 (Finding of Fact 4). In addition, the court concluded that Mr. Chappelle understood that we would not have standby counsel or a continuance if he decided to represent himself. CP 291-92 (Finding of Fact 3). The trial court’s conclusions are not supported by the record.

The defendant need not be informed of his right to self-representation, instead he must demand it. State v. Modica, 136 Wn. App. 434, 441, 149 P.2d 446 (2006), aff’d, 164 Wn.2d 83, 186 P.2d 1062 (2008); State v. Fritz, 21 Wn. App. 354, 538, 585 P.2d 173 (1978), rev. denied, 92 Wn.2d 1002 (1979). Mr. Chappelle did not demand that he represent himself, and he seemed to view self-representation as a necessary step in obtaining new counsel. Mr. Chappelle’s his waiver of his constitutional right to counsel was not knowing, intelligent, and voluntary.

d. Mr. Chappelle's waiver was not valid because the trial court did not warn him of the dangers of self-representation or inform him of the nature of the charged offense. When a defendant wishes to waive his constitutional right to counsel and represent himself, the court should engage in a colloquy with the defendant to ensure the defendant understands the dangers of self-representation. Acrey, 103 Wn.2d at 122.

Prior to accepting a waiver of counsel, the court must inform the defendant of the dangers and disadvantages of self-representation so that the record will establish that “he know what he is doing and his choice is made with eyes open.”

State v. Dougherty, 33 Wn. App. at 469 (quoting Faretta, 422 U.S. at 835) (internal citations omitted). In addition to warning the defendant that he must follow technical rules, such as the rules of evidence, the court must inform him “that presenting a defense is not just a matter of telling one’s story.” Acrey, 103 Wn.2d at 211; State v. Christensen, 40 Wn. App. 290, 294, 698 P.2d 1069, rev. denied, 104 Wn.2d 1003 (1985) (both citing Maynard v. Meachum, 545 F.2d 273 (1<sup>st</sup> Cir. 1976)).

This fact was not made clear to Mr. Chappelle during his colloquy with Judge Hayden. While the court asked Mr. Chappelle if

he knew the rules of evidence and what a CrR 3.5 and CrR 3.6 hearing was, he did not explain that presenting a defense involved more than just telling the jury your story. 11/13/12 RP 12, 14-15. The trial court, for example, did not ask Mr. Chappelle if he knew the procedure for choosing a jury, even though jury selection was imminent. The also did not inquire into Mr. Chappelle's level of education.<sup>3</sup>

In addition, the trial court did not carefully explain the dangers of self-representation to Mr. Chappelle. The court did not explain that Mr. Chappelle might look bad in front of the jury if he did comply with evidence rules or made procedural blunders. Nor did the court explain that the process for testifying, calling defense witnesses, cross-examining the State's witnesses, and making objections was complicated. Thus, while the court "advised" the defendant against self-representation, the court did not explain the reasons for this advice.

In addition, the court should inform the defendant "of the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist which will bind the defendant in the presentation of his case." Acrey, 103 Wn.2d at 211. If there is no

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<sup>3</sup> Mr. Chappelle's written motions, for example, appear to have been largely copies from pleadings in other cases, and only few paragraphs address his case.

colloquy, the defendant's understanding must appear elsewhere in the record. Id.

While the court explained the sentencing consequences of a conviction for second degree assault, it did not determine if Mr. Chappelle knew the elements of that crime, possible defenses, or lesser-included offenses. Nor did the court explain what the State would need to prove for the deadly weapon enhancement and how that differed from the element of second degree assault. Thus, the court did not inform Mr. Chappelle of the nature of the charges against him, and the trial court's finding that it did so is unsupported by the record of the colloquy. CP 291 (Finding of Fact 3).

The inadequacy of the colloquy was revealed when, after trial, Mr. Chappelle requested counsel for sentencing because "I don't know the sentencing guidelines and a lot of other things." 2/1/13 RP 6. The trial court did not carefully test Mr. Chappelle's ability to represent himself, warn him of the dangers of self-representation, or inform him of the nature of the charges against him. The waiver was thus not knowing, intelligent, and voluntary.

e. Mr. Chappelle's conviction must be reversed and remanded for a new trial. Counsel is so fundamental to the right to a fair trial that the erroneous deprivation of that right is not subject to a harmless error analysis. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed .2d 35 (1999); Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Silva II, 108 Wn. App. at 542 (quoting Frazer v. United States, 18 F.3d 778, 782 (9<sup>th</sup> Cir. 1994)). Mr. Chappelle's constitutional right to counsel was violated when the court permitted him to represent pro se without a knowing, intelligent, and voluntary waiver. His conviction must be reversed and remanded for a new trial. Acrey, 103 Wn.2d at 212.

**2. Mr. Chappelle was forced to go to trial without the materials he needed for his defense as required by the Washington Constitution.**

When a defendant who is detained in jail pending trial exercises his constitutional right to represent himself, article I section 22 guarantees "a right of reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense." State v. Silva, 107 Wn. App. 605, 622, 27 P.3d 663 (2001) (Silva I). Mr. Chappelle was incarcerated and began representing himself immediately prior to

jury selection. He did not receive the witness and police statements and expert reports until shortly before the witnesses testified. He did not have access to an investigator or even a telephone access for locating defense witnesses and arranging for their appearance in court. Mr. Chappelle did not have legal materials. And he was not provided with standby counsel for advice or assistance. Mr. Chappelle's state constitutional right to access to the resources he needed to represent himself was violated, and his conviction must be reversed.

a. Mr. Chappelle did not receive the materials he needed in time to adequately defend himself. When Mr. Chappelle's former attorney left the courtroom, he did not provide Mr. Chappelle with the discovery or materials he obtained in preparation for trial. 11/13/12 RP 17-18, 19, 50; 11/15/12 RP 6-7; 4/30/13 RP 13. In addition, Mr. Chappelle did not have the redacted copy of portions of the discovery he had earlier been provided because he was transferred to the jail from a work release facility prior to trial without his legal materials. CP 316; 11/15/12 RP 5-6; 4/30/13 RP 5, 13, 16, 21. The redacted discovery, which was first approved by the prosecutor's office, would not have included the witnesses' names or contact information, medical reports or photographs. 4/30/13 RP 16-17; Post-Trial Ex. 1.



The State's first witness Detective Norton testified on November 13, the same day Mr. Chappelle was granted pro se status. 11/13/12 RP 32. When the prosecutor had the detective's report marked as an exhibit, Mr. Chappelle objected because he had not seen the report before and told the court he did not have any discovery. 11/13/12 RP at 46, 49. The court told Mr. Chappelle that he would get the discovery that evening, adding that the detective's report was unlikely to be introduced as evidence. Id. at 46-47. At the request of the prosecutor, however, the case was recessed to the next day so that she could provide Mr. Chappelle with discovery. Id. at 48-50. At trial the next day, Mr. Chappelle was able to use information from the transcripts of the defense interviews of two of the three witnesses in cross-examination. 11/14/12 RP 46-48, 50-51, 78-80.

On morning of November 15, Mr. Chappelle told the court that he did not have copies of the police officers' statements, the Superform, the medical reports, or his booking photograph. 11/15/12 RP 5, 6-7. He also asked for a recess because he had received the witness statements the same day that the witnesses testified, which did not provide him with sufficient time to prepare for cross-examination. Id. at 7-9. The State then gave Mr. Chappelle copies of the statements of

the detective and five police officers, the Superform, the CAD report, the evidence list, his booking photograph. Id. at 9-10, 11, 13. Officer Jay Crumpton testified, but there is no record that the prosecutor gave Mr. Chappelle a copy of a written statement from Crumpton. Id. at 9-10, 138. At some point, the prosecutor gave Mr. Chappelle a redacted copy of the victim's medical records and the crime lab report. 11/15/12 RP 14; 11/19/12 RP 21-22.

At the end of court that day, the prosecutor said that defense witness Leonard Kelly had not returned her telephone calls. 11/15/12 RP 153. Mr. Chappelle explained that he could not make telephone calls from the jail, and the court suggested that Mr. Chappelle ask his family members, who were in court, to help him. Id. at 153-54. Mr. Kelly later testified, but Mr. Chappelle had no opportunity to locate any other witnesses.

b. Mr. Chappelle's constitutional right to meaningful access to the resources he needed to represent himself was violated. An incarcerated pro se defendant has the right to state-provided materials necessary to prepare a meaningful defense. Silva I, 107 Wn. App. at 622.

The right of self-representation guaranteed in our state constitution is a substantive right, not a mere formality.

Just as the right to appointed counsel is not satisfied unless the representation is meaningful, the right to represent oneself cannot be satisfied unless it is made meaningful by providing the accused the resources necessary to prepare an adequate pro se defense.

Id. at 620-21. The trial court has the discretion to determine how to ensure this right is honored based upon all of the circumstances of the individual case. Id. at 622-23. Relevant factors include “the nature of the charge, the complexity of the issues involved, the need for investigative services, the orderly administration of justice, the fair allocation of judicial resources . . . legitimate safety and security concerns, and the conduct of the accused.” Id.

In Silva, this Court found that the defendant was provided the material he needed for his defense. Silva I, 107 Wn. App. at 626. In addition to standby-counsel who provided both technical assistance, coordination, and access to an investigator, Silva was provided access to legal materials, paper and pencil, copying services, inmates’ telephone, blank subpoenas, postage, access to a notary, and witness interviews in the prosecutor’s office. Id. at 609, 611, 625. Here, in contrast, Mr. Chappelle was not provided with basic discover materials until after the first witness began his testimony and thus did not have the materials in time to adequately prepare his cross-examination.

He also did not have the materials he needed to present his own case. While his prior attorney utilized an investigator, the attorney did not provide Mr. Chappelle with the investigator's reports, including his efforts to locate potential defense witnesses. Instead, Mr. Chappelle only received were copies of transcripts of the investigator's interview of government witnesses that had been provided to the State. In addition, Mr. Chappelle had no way to do his own investigation. He presumably could use the inmates' telephones when he was not in court, but he could not pay for telephone service. Also the Silva Court found access to the jail telephone case sufficient, it was supplemented in that case by his standby counsel's efforts. See Silva I, 107 Wn. App. at 624.

In addition, Mr. Chappelle was not provided with legal materials. In Silva I the defendant was not permitted to go to the King County Law Library, but was provided with the court rules, relevant titles of the Revised Code of Washington Annotated, relevant volumes of the Washington Practice Manual, and copies of cases that he requested. Silva I, 107 Wn. App. at 623. In contrast, Mr. Chappelle was not even given a copy of the Rules of Evidence or the relevant criminal statutes.

Mr. Chappelle was charged with second degree assault, a strike offense, with a deadly weapon allegation. He attempted to represent himself during a trial where he received witness statements and reports shortly before most witnesses testified. He had no standby counsel, no access to legal materials, and no way to investigate or locate defense witnesses. His constitutional right to meaningful access to the material he needed to defend himself was violated.

c. Mr. Chappelle's second degree assault conviction must be reversed. Mr. Chappelle was not provided with the witness statements, police reports, and medical records in time to meaningfully use them to defend himself. In addition, he did not have access to necessary legal materials such as the Rules of Evidence. Mr. Chappelle's state constitutional right to access to the material he needed to represent himself was violated, and his conviction must be reversed and remanded for a new trial.

**3. Mr. Chappelle's constitutional right to effective assistance of counsel was violated because the attorney who represented him at his motion for a new trial had a conflict of interest that hampered her representation.**

When Mr. Gonzales was discharged as Mr. Chappelle's attorney, he did not provide Mr. Chappelle with the material in his file

as required by the ethical rules. The attorney who was later appointed to represent Mr. Chappelle in pursuing a motion for a new trial worked in the same public defender agency as Mr. Gonzales. This relationship prevented her from revealing Mr. Gonzales' ethical violation or using it as a basis for a new trial. Mr. Chappelle's case must be remanded for a hearing on his motion for new trial with conflict-free counsel.

a. The accused as the constitutional right to effective, conflict-free counsel. Defense counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland, 466 U.S. at 684-85; United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronin, 466 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Strickland, 466 U.S. at 686; State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010).

Defense counsel has an ethical duty of loyalty to her client which includes a duty to avoid conflicts of interest. Strickland, 466

U.S. at 688; Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); State v. McDonald, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). The defendant also has the constitutional right to counsel who is free from conflicts of interest. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). Given the obligation of counsel to avoid conflicts of interest, representation by an attorney with a conflict of interest is presumed to be prejudicial if the defendant demonstrates “that an actual conflict of interest adversely affected his lawyer’s performance.” Strickland, 466 U.S. at 692 (quoting Sullivan, 446 U.S. at 345-50); accord State v. Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003).

b. Mr. Chappelle’s counsel was unethical in not providing him with his file so that he could represent himself, and counsel moving for a new trial had a conflict of interest that prevented her from raising his misconduct. When the trial court granted Mr. Chappelle’s motion to discharge his attorney on the second day of trial, Mr. Gonzales immediately left the courtroom, explaining he had another case on the trial calendar, and he did not provide Mr. Chappelle with the materials he had prepared for his defense. CP 346; 4/30/13 RP 13.

When an attorney-client relationship ends, the attorney has a continuing ethical obligation to protect the client's interests by ensuring a smooth transfer of the case, including providing new counsel with the case file and surrendering papers and property to the client. RPC 1.16(d) (2006); In re Disciplinary Proceedings Against Eugster, 166 Wn.2d 293, 302, 310, 314, 318, 209 P.3d 435 (2009) (conduct of attorney in refusing to turn over client file to the new attorney and failing to turn over papers and property to the client violated Former RPC 1.15(d)). The rule reads in relevant part:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

RPC 1.16(d).

Mr. Gonzales violated his duty to ensure a smooth transition of the case to Mr. Chappelle. In his hurried departure from the court room, Mr. Gonzales did not provide Mr. Chappelle with his file or the materials he had prepared to defend the case. Mr. Chappelle was thus left to proceed pro se without the material he needed.

After Mr. Chappelle was convicted, the court granted his motion for the appointment of counsel to represent him for purposes of post-



trial motions and sentencing. CP 347; 2/1/13 RP 5-7. The Office of Public Defense re-appointed the Northwest Defender Association, and Ramona Brandes of that office appeared as counsel for Mr. Chappelle. CP 293-95, 348-50. Ms. Brandes filed a motion for new trial arguing that Mr. Chappelle's waiver of his constitutional right to counsel was not valid and that the State did not provide him with the legal materials he was constitutionally entitled to conduct his defense. CP 131-71, 243-71. Ms. Brandes, however, did not address Mr. Gonzales's contribution to the problem by his failure to provide Mr. Chappelle with his file. Id. If she had, Ms. Brandes would have exposed her coworker to possible disciplinary action. She thus had a conflict of interest that denied Mr. Chappelle effective assistance of counsel.

Ethical rules prohibited Ms. Brandes from representing Ms. Chappelle "if the representation involves a current conflict of interest." RPC 1.7(a). The conflict may be with "the personal interest of the lawyer." RPC 1.7(a)(2); State v. Jensen, 125 Wn. App. 319, 330, 104 P.3d 717 (citing former RPC 1.7(b)), rev. denied, 154 Wn.2d 1011 (2005). The comments to the rule explain:

The lawyer's own interest should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or

impossible for the lawyer to give a client detached advice. . . .

Karl B. Tegland, 2 Washington Practice: Rules Practice, Official Comment to RPC 1.7, at 343 (7<sup>th</sup> Ed. 2011). In evaluating conflicts of interest, attorneys working in the same law firm, including a public defender association, are generally treated as one attorney. RPC 1.0(c); State v. Hatfield, 51 Wn. App. 408, 412, 754 P.2d 136 (1988).

Whether the circumstances of a particular case constitute a conflict of interest under the ethical rules is a question of law reviewed de novo. State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783, rev. denied, 165 Wn.2d 1012 (2008).

c. Mr. Chappelle did not validly waive the conflict of interest.

At the beginning of the motion for a new trial, the court asked Mr. Chappelle if he was comfortable being represented by Ms. Brandes even though she was in the same office as Mr. Gonzales and asked him to waive any conflict of interest. 4/30/12 RP 5-6. Ms. Brandes said she did not think there was a conflict of interest, but that she had advised her client not to waive any conflicts. Id. at 5-6.

A waiver of conflict-free counsel must be knowing, intelligent, and voluntary. Dhaliwal, 150 Wn.2d at 567; State v. James, 48 Wn. App. 353, 364, 739 P.2d 1161 (1987). While Mr. Chappelle said he did

not have a conflict with Ms. Brandes, she believed there was no conflict of interest. She thus had not informed Mr. Chappelle of the conflict caused by her colleague's ethical lapse in failing to provide Mr. Chappelle with his file.

Comment [EW1]:

The defendant's waiver of the potential conflict of interest was not valid in Dhaliwal because the trial court did not fully explore the nature and extent of the conflict with the defendant or explain the consequences of his choice of attorney. Dhaliwal, 150 Wn.2d at 567-68. In addition, the defendant's simple affirmative answers to the court's questions did not reveal his understanding of the situation. Id.

The same is true here. The trial court did not explore the possible conflict of interest with Mr. Chappelle, but simply pointed out that both attorneys were from the same public defender agency. Mr. Chappelle responded "yes" when if he was "comfortable" with Ms. Brandes, and he later said he did not have any conflicts. 5/30/13 RP 5-6. Moreover, the trial court had earlier informed Mr. Chappelle that he no longer had the right to counsel, and Mr. Chappelle may have been afraid to express any reservation for fear of again be in the position of again representing himself. 11/13/12 RP 26-27; 2/1/13 RP 4-5, 6-7. The trial court did not explore the conflict of interest with Mr.

Chappelle, and the record does not demonstrate a knowing, intelligent or voluntary waiver of the right to conflict-free counsel.

d. Mr. Chappelle's conviction must be reversed because his attorney's conflict of interest adversely impacted her performance in litigating his motion for a new trial. Ms. Brandes filed a motion for a new trial, arguing that Mr. Chappelle did not receive the materials he needed in order to adequately represent himself. She attacked the State for not giving Mr. Chappelle timely and complete discovery, and she attacked the court for not providing Mr. Chappelle with requested continuances until he had the materials and had the opportunity to study them. But defense counsel did not attack her fellow employee for failing to provide Mr. Chappelle with his file, particularly the results of his investigation into potential defense witnesses and other materials he prepared for trial. She thus had an actual conflict that adversely affected her performance.

Counsel's duty of loyalty to her client is "perhaps the most basic of counsel's duties. Strickland, 466 U.S. at 692. It is also difficult to evaluate the effect of a conflict of interest has on an attorney's representation of a particular client. Id.; Holloway v. Arkansas, 435 U.S. 475, 490-91, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). Prejudice is

therefore presumed once the defendant demonstrates that counsel has actual conflict of interest that adversely affected the attorney's performance. Strickland, 466 U.S.at 692; Sullivan, 446 U.S. at 349-50; Dhaliwal, 150 Wn.2d at 571. Mr. Chappelle thus need now show that he would have prevailed in his motion for a new trial if his attorney had not had a conflict of interest, merely that her performance was negatively affected by the conflict.

In litigating Mr. Chappelle's motion for a new trial, Ms. Brandes's performance was harmed by her conflict of interest, as she did not address Mr. Gonzales's failure to promptly provide Mr. Chappelle with the file materials he needed to represent himself. Mr. Chappelle's case must be remanded for a new motion for a new trial with conflict-free counsel. See McDonald, 143 Wn.2d at 514; James, 48 Wn. App. at 369.

E. CONCLUSION

Mr. Chappelle's conviction for second degree assault must be reversed and remanded for a new trial because (1) he did know knowingly, intelligently, and voluntarily waive his constitutional right to counsel, and (2) he did not timely receive the materials he needed to represent himself at trial. In the alternative, Mr. Chappelle's case must

be remanded for a new motion for a new trial with conflict-free  
counsel.

DATED this 31<sup>st</sup> day of January 2014.

Respectfully submitted,

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